UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-3795-GW(JPRx)	Date	February 8, 2016
Title	*Jesus Abad, et al. v. Lumber Liquidators, Inc.*		

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Alexander Robertson, IV Andrew J. Mcguiness	Kimberly R. Gosling William L. Stern

PROCEEDINGS: **DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT [32];**

PLAINTIFFS' MOTION FOR LEAVE TO FILE CORRECTED SECOND AMENDED CLASS ACTION COMPLAINT [92];

PLAINTIFF'S MOTION TO STRIKE PORTIONS OF DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS [97]

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. Based on the Tentative, and for reasons stated on the record, Plaintiffs' motions are DENIED. Plaintiffs will file a supplemental brief as to Defendant's motion to dismiss by March 1, 2016. Defendants will have until March 22, 2016 to respond. Defendant's motion is continued to March 31, 2016 at 8:30 a.m.

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Initials of Preparer JG

Abad, et al. v. Lumber Liquidators, Inc., Case No. 2:15-cv-03795 GW-JPR
Tentative Ruling on: (1) Motion to Dismiss Plaintiffs' Second Amended Complaint, (2) Motion for Leave to File Corrected Second Amended Class Action Complaint, and (3) Motion to Strike Portions of Defendant's Reply in Support of its Motion to Dismiss

Lumber Liquidators, Inc. ("Defendant") moves to dismiss the Second Amended Complaint ("SAC") filed on September 4, 2015 by 44 individuals ("Plaintiffs"), asserting 40 causes of action.[1] *See* Docket No. 22. Generally-speaking (as pled), this case concerns Defendant's laminate wood flooring and Defendant's communications – in its advertising and webpages – that the flooring has certain durability qualities, including abrasion class ("AC") ratings. *See, e.g.,* SAC ¶¶ 2-8, 56-82, 84, 117, 131. Here, Plaintiffs are particularly concerned about Defendant's "Dream Home" proprietary brand of laminate flooring, which Defendant asserts have an AC rating of "AC3." *See id.* ¶ 5. Plaintiffs assert that they learned, via their own testing "[o]ver the past several months," that all of the models of Dream Home laminate flooring they purchased failed to meet the AC3 rating. *See id.* ¶ 10. Plaintiffs are attempting to represent a nationwide class of "[a]ll Persons in the United States who purchased Defendant's Dream Home brand laminate flooring products from Defendant for personal use in their homes" or, alternatively, 32 separate classes of individuals from particular states. *See id.* ¶ 99.

Over two weeks after they filed their Opposition to the motion to dismiss, and four days before Defendant filed its Reply in support thereof, Plaintiffs filed a motion for leave to file a *corrected* SAC. *See* Docket No. 92. Defendant does not oppose that motion so long as Plaintiffs agreed that any ruling on the motion to dismiss would apply equally to the corrected SAC. *See* Docket No. 98. Plaintiffs have not responded to that position. Finally, two days after Defendant filed its Reply in support of the motion to dismiss, Plaintiffs filed a motion to strike certain portions of that Reply, setting the hearing date on it for February 18, 2016, ten days *after* the hearing date on the motion to dismiss. *See* Docket No. 97.

[1] The causes of action are for breach of implied warranty, fraudulent concealment, violation of the Magnuson-Moss Warranty Act (15 U.S.C. §§ 2301, et seq.), violations of California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, et seq.), False Advertising Law (Cal. Bus. & Prof. Code § 17500) and Consumer Legal Remedies Act (Cal. Civ. Code § 1750), "breach of implied warranties – redhibition" under Louisiana law, and violations of various consumer statutes from 31 other states.

Before proceeding to a discussion of the motion to dismiss, the Court will quickly dispense with Plaintiffs' two motions. As the analysis of the motion to dismiss will make clear, Plaintiffs will need to amend their SAC if this case is to proceed further. At that time, they may add in the other amendments that are part of their proposed *corrected* SAC. As for the motion to strike, the Court agrees with Defendant that, as pled thus far, this case is *not* a pure omissions case. *See, e.g.,* SAC ¶¶ 2-8, 56-82, 84, 117, 131. Consequently, those portions of Defendant's Reply that were devoted to counteracting Plaintiffs' assertion in their Opposition that this case *is* a pure omissions case do not fall within the rule prohibiting new arguments made for the first time in reply. *See, e.g., Am. Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1106 n.14 (9th Cir. 2003) (denying motion to strike reply brief where "[t]he 'new' arguments raised in the City's reply brief were a reasonable response to points made in the ACLU's answering brief"); *Minden Pictures, Inc. v. Pearson Educ., Inc.*, 929 F.Supp.2d 962, 970 (N.D. Cal. 2013). Therefore, the Court would deny both the motion for leave to file a corrected SAC and the motion to strike.

A. Applicable Procedural Standard

Under Fed. R. Civ. P. 8(a) a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009). While the pleading standard of Rule 8 does not require "detailed factual allegations," it demands more than an unadorned, "the-defendant-unlawfully-harmed-me accusation." *See id.* Thus, Plaintiffs' obligation to provide the grounds for their "entitlement to relief" requires more than labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986) (finding that on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001) (holding that "conclusory allegations of law… are insufficient to defeat a motion to dismiss").

A defendant may move to dismiss some or all claims in a complaint pursuant to Fed. R. Civ. P. 12(b)(6). A court must take all allegations of material fact as true and construe the allegations in the light most favorable to the plaintiff. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Enesco Corp. v. Price/Costco Inc.*, 146

F.3d 1083, 1085 (9th Cir. 1998).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *See id.* Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *see also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (finding that a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely"). Where statutes of limitation are at issue, "'a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir.2010) (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir.1995)).

In its consideration of the motion, the court is limited to the allegations on the face of the complaint (including documents attached thereto), matters which are properly judicially noticeable and documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruling on other grounds recognized in Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). In addition, "[a] court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).[2]

[2] The Court grants Defendant's request for judicial notice (though it is not technically asking for "judicial notice" as opposed to a determination that the materials in question are simply permissibly considered in connection with this Rule 12(b)(6) motion), *see* Docket No. 33, pursuant to the rules referenced above. It denies Plaintiffs' request for judicial notice as set forth in Docket Number 46, but grants Plaintiffs'

B. Analysis

The Court is prepared to issue rulings on certain discrete issues, though (for reasons stated) it cannot issue rulings on all of the issues/claims raised in Defendant's motion. Plaintiffs should apply these rulings, as appropriate, in any further amendment of their complaint.

1. Choice of Law

To begin with, the first two claims in the SAC – for breach of implied warranty and fraudulent concealment – do not appear to rely on any particular state's law. Yet, neither Plaintiffs in the SAC, nor Defendant in its motion to dismiss, make any attempt to engage in a choice of law discussion. How the parties expect the Court to engage in a fruitful discussion of these claims – beyond the general application of applicable Federal Rules of Civil Procedure – in the absence of that effort is unclear. For that reason alone, the Court believes that it cannot rule upon (and therefore neither grants nor denies) Defendant's motion insofar as at least the breach of implied warranty claim is concerned.

2. Rule 9(b)

What the Court is prepared to say at this time is that, with the exception of the warranty claims, the claims in the SAC "sound in fraud," meaning that Plaintiffs are required to comply with Federal Rule of Civil Procedure 9(b) with respect to such claims.[3] *See, e.g.*, *In re Daou Sys., Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003). This includes any claims that are – or will be, in a further amendment – based purely on alleged omissions or concealments.[4] *See*

(unopposed by Defendant) request for judicial notice as set forth in the course of their opposition to Defendant's own request for judicial notice, *see* Docket No. 45.

[3] The SAC is *already* 136 pages and 618 paragraphs long. The parties must be aware that Plaintiffs' decision to prosecute this one individual case as a nationwide class or, alternatively, an attempt to certify 32 separate state classes, will have a *significant* impact on the speed (or lack thereof) of the case's processing. In addition, 25-page briefs will almost certainly be almost always inadequate for assessing the case as a whole, as the Court has found to be true with regards to the instant motion. The Court will *not* do the necessary work/analysis for the parties where page limits restrict their ability to present and discuss the issues. Lengthy string-cites, without analysis, and/or single-sentence arguments (especially where made only in footnotes) will not do the trick. The parties need to have in mind a workable plan for just how this case will proceed.

[4] The Court notes that Plaintiffs may not attempt to amend the SAC through new material discussed in their Opposition to the motion to dismiss. *See, e.g.*, *Fabbrini v. City of Dunsmuir*, 544 F.Supp.2d 1044, 1050 (E.D. Cal. 2008).

Kearns v. Ford Motor Co., 567 F.3d 1120, 1126-27 (9th Cir. 2009).

Here, the SAC falls short of Rule 9(b)'s requirements with respect to many, if not all, of the individual plaintiffs identified in this action. At a minimum, many of them have not identified *when* they saw any of the statements some of them recite, and a number of them do not identify any statements at all (and, necessarily, how they could have relied on them). They also do not identify why at least certain of the statements quoted were misleading or false.[5]

Plaintiffs may amend, but a continued failure to abide by Rule 9(b)'s requirements will result in dismissal.

3. Puffery

The Court agrees with Defendant that the statements "very durable," "premium" and "raised the bar" are non-actionable puffery. *See Rasmussen v. Apple Inc.*, 27 F.Supp.3d 1027, 1042-43 (N.D. Cal. 2014); *Viggiano v. Hansen Nat. Corp.*, 944 F.Supp.2d 877, 894-95 (C.D. Cal. 2013).

4. Injunctive Relief

"[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). The Court agrees with Defendant that Plaintiffs lack standing to pursue injunctive relief. "To have standing to assert a claim for prospective injunctive relief, a plaintiff must demonstrate 'that he is realistically threatened by a repetition of [the violation].'" *Melendres v. Arpaio*, 695 F.3d 990, 997 (9th Cir. 2012) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). Here, Plaintiffs complain of fraudulent activity, or other attempts to deceive them in connection with Defendant's laminate flooring. Considering what they now know (or allege), there is no threat of repetition of any such violation. *See, e.g.*, *Anderson v. The Hain Celestial Grp., Inc.*, 87 F.Supp.3d 1226, 1233-35 (N.D. Cal. 2015); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 574-75 (C.D. Cal. 2014).

5. Products-Not-Purchased

The Court also agrees with Defendant that Plaintiffs do not have standing with respect to products they did not purchase (with a potential exception if they can demonstrate that the products and misrepresentations in question are substantially similar). *See Tria v. Innovation Ventures, LLC*, No. 2:11-cv-07135 GW (PJWx), Docket No. 167, at pgs. 4-6 of 15; *Contreras v. Johnson & Johnson Consumer Cos., Inc.*, No. 12-CV-7099 GW (SHx), Docket No. 19, at pgs. 2-3 (C.D. Cal. Nov. 29, 2012); *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), Docket No. 212, at pg. 2 n.2 (C.D. Cal. Apr. 12, 2012); *see also Jones v. Porsche Cars N. Am., Inc.*, No. CV 15-5766-GW (SSx), Docket No. 15, at pgs. 4-5 of 10 (C.D. Cal. Oct. 15, 2015); *id.*, Docket No. 16 (adopting tentative ruling as final); *Cortina v. Goya Foods, Inc.*, 94 F.Supp.3d 1174, 1197-98 (S.D. Cal. 2015).[6]

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[5] The Court is less troubled, on this examination, by the question of whether Plaintiffs' allegations concerning knowledge and intent meet the governing Rule 8 standards. *See* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

6. Other Standing Arguments

The Court otherwise rejects Defendant's argument that Plaintiffs do not have standing because they have not shown injury-in-fact, causation or reliance (especially where it appears that Plaintiffs intend to make this into an omission/concealment case). This is not to say, however, that there are not *pleading* defects related to one or more of these topics.

7. Unfair Competition

Defendant argues that Plaintiffs' California Business and Professions Code § 17200 claim fails because they have not pled a "predicate unlawful act" for purposes of the "unlawful" prong of that statute. First, they have in fact identified predicate statutes which they allege were violated. *See* SAC ¶¶ 153, 165. Second, even if they had not, Plaintiffs' Section 17200 claim is not based solely on the "unlawful" prong of that statute, *see id.* ¶¶ 154-55, and the Court does not dismiss *parts* of claims on a Rule 12(b)(6) motion. In addition, Defendant may not shift its argument in its Reply to an assertion that the "unlawful" aspect of Plaintiffs' Section 17200 claim should be dismissed because none of the predicate acts are "viable."

8. Magnuson-Moss Warranty Act

The Magnuson-Moss Warranty Act ("MMWA") provides a federal cause of action for state warranty claims. *See Tietsworth v. Sears*, 720 F.Supp.2d 1123, 1143 (N.D. Cal. 2010). According to the statute, claims under the MMWA may not be brought in federal court "if the action is brought as a class action, and the number of named plaintiffs is less than one hundred." *See* 15 U.S.C. § 2310(d)(3)(C). There are fewer than 100 named plaintiffs here. Nonetheless, Plaintiffs assert that this provision is effectively nullified by the jurisdictional provisions of the Class Action Fairness Act ("CAFA"). Where CAFA jurisdiction exists (as Plaintiffs assert it does here, *see* SAC ¶ 53), courts do indeed appear to have effectively ignored the terms of section 2310(d)(3)(C). *See Keegan v. Am. Honda Motor Co., Inc.*, 838 F.Supp.2d 929, 954-55 (C.D. Cal. 2012); *Route v. Mead Johnson Nutrition Co.*, No. CV 12-7350-GW (JEMx), 2013 WL 658251, *6 (C.D. Cal. Feb. 21, 2013). The Court therefore rejects this argument for dismissal of the SAC's MMWA claim.

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[6] Although district courts take varying approaches to this issue, it does not appear that the Ninth Circuit has weighed in on it yet.

However, the Court agrees with Defendant that Plaintiffs' allegations regarding provision of notice are insufficient under *Iqbal*. *See Tietsworth*, 720 F.Supp.2d at 1143 ("The MMWA requires that a plaintiff provide a defendant with an opportunity to cure the alleged breach, and the defendant itself must have refused directly to provide a cure."); 15 U.S.C. § 2310(e). Although Plaintiffs believe this issue is off-limits until the class certification stage and/or that the plaintiffs need not even give notice until that stage of this lawsuit and/or that notice given after the lawsuit is filed can serve as proper notice for *other individuals* who later join the action as plaintiffs, this Court disagrees. The warranty obligor must be given "a reasonable opportunity to cure [a] failure to comply with the warranty." 15 U.S.C. § 2310(e). If Plaintiffs are able to cure this defect in a future amendment, the Court will then consider the remainder of Defendant's arguments now directed at the MMWA claim.[7]

9. Class Claims Under Various State Consumer Protection Statutes

Defendant argues that Plaintiffs may not bring class actions under the consumer protection statutes of Georgia (Ga. Code Ann. § 10-1-399(a) (stating that a person may "bring an action individually, but not in a representative capacity")), Kentucky (Ky. Rev. Stat. § 367.170), Louisiana (La. Rev. Stat. Ann. § 51:1409(A) (stating that a person "may bring an action individually but not in a representative capacity")), Mississippi (Miss. Code Ann. § 75-24-15(4) ("Nothing in this chapter shall be construed to permit any class action or suit. . . .")), Tennessee (Tenn. Code § 47-18-109(a)(1) (allowing a person to "bring

[7] Plaintiffs should be prepared to explain, however, how their written warranty-based claims satisfy the requirements of 15 U.S.C. § 2301(6)(A).

an action individually")) and South Carolina (S.C. Code Ann. § 39-5-140(a) (stating that a person may "bring an action individually, but not in a representative capacity")), and that there are unmet preconditions to bringing such actions under Iowa (Iowa Code § 714H.7 ("A class action lawsuit alleging a violation of this chapter shall not be filed with a court unless it has been approved by the attorney general.")) and Ohio (Ohio Rev. Code Ann. § 1345.09(B) (allowing a class action recovery if an act or practice has been "declared to be deceptive or unconscionable by rule" or "determined by a court of this state to violate" Ohio Rev. Code Ann. §§ 1345.02, 1345.03 or 1345.031)) law. Plaintiffs respond that this argument cannot prevail given the Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010).

In its Reply, Defendant responds that state statutes trump Rule 23's federal class action mechanism where the state statute is substantive, rather than procedural, citing *In re Target Corp. Customer Data Sec. Breach Litig.*, 66 F.Supp.3d 1154, 1165 (D. Minn. 2014), *Davenport v. Charter Commc'ns, LLC*, 35 F.Supp.3d 1040, 1051 (E.D. Mo. 2014), *Stalvey v. Am. Bank Holdings, Inc.*, No. 4:13-CV-714, 2013 WL 6019320, *4 (D.S.C. Nov. 13, 2013), and *Bearden v. Honeywell Int'l Inc.*, No. 3:09-1035, 2010 WL 3239285, *10 (M.D. Tenn. Aug. 16, 2010). And, as to the Iowa and Ohio statutes, Defendant argues that those laws do not prohibit class actions; they just add requirements for initiation of them. They point out that Plaintiffs have not disputed that they have failed to satisfy those requirements.

With the exception of the claim based on the Kentucky statute, the Court finds Defendant's arguments (and the aforementioned decisions' rationales) persuasive, and therefore dismisses the subject claims to the extent that Plaintiffs (or at least certain of the Plaintiffs) seek to advance them as class claims. In contrast with the Georgia, Louisiana, Mississippi, Tennessee and South Carolina laws, the Kentucky statute contains no language barring a class claim.

10. Statute of Limitations

Defendant argues that plaintiff Krista Lee's claim under the Kansas Consumer Protection Act is barred by the two-year statute of limitations, and Plaintiffs concede that point. *See* Docket No. 86, at 25:9-12.

Defendant also argues that the same is true with respect to those plaintiffs attempting to sue under Georgia, Maryland, Oklahoma and Illinois law. Plaintiffs respond that the Court cannot reach that conclusion now because of the possible applicability of equitable tolling principles and/or the discovery rule. But Plaintiffs must plead facts supporting application of tolling. *See, e.g., Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045-46 (9th Cir. 2011); *Eidson v. Medtronic, Inc.*, 981 F.Supp.2d 868, 893 (N.D. Cal. 2013); *Appling v. Wachovia Mortg., FSB*, 745 F.Supp.2d 961, 969 (N.D. Cal. 2010); *Horne v. Harley-Davidson, Inc.*, 660 F.Supp.2d 1152, 1158 (C.D. Cal. 2009); *Delino v. Platinum Cmty. Bank*, 628 F.Supp.2d 1226, 1233-34 (C.D. Cal. 2009); *Plascencia v. Lending 1st Mortg.*, 583 F.Supp.2d 1090, 1097 (N.D. Cal. 2008). To this point, they have not done so.

C. Conclusion

Plaintiffs must amend in accordance with the foregoing analysis if they are to proceed further with this action.